No. 22,338

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FASTENER NUT COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE RESPONDENT

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[illegible]
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No. 22,338

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JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board[1] for enforcement of its Order against Continental Nut Company[2] issued on May 10, 1967. (R. 57.) The Board's Decision and Order is reported at 164 NLRB No. 72. In its Answer, Respondent has denied the commission of any unfair labor practices, and has requested that the Court deny enforcement of the Board's Order. (R. 62.) The Court has jurisdiction of this proceeding under Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the events in this case having occurred in Chico, California.

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[1]Hereinafter called the "Board".

[2]Hereinafter called "Respondent" or "Company".

COUNTER STATEMENT OF THE CASE

A. Questions Presented to the Court.

(1) It is the Respondent's position that the rule applicable in this Court with respect to the construction and effect of the Consent-Election Agreement[3] requires that the Regional Director's determinations as to questions of fact or procedure be upheld unless they are shown to be arbitrary or capricious, but that his legal conclusions or determinations are subject to review without regard to the arbitrary or capricious standard.

(2) It is the Respondent's further position that the Regional Director applied a legal standard which was contrary to the provisions of the National Labor Relations Act[4] and that, as a result of this legal interpretation, no factual investigation was made upon which the Regional Director could base determinations as to the most significant element in the case, i.e., the impact upon the employees' freedom of choice of the Union conduct challenged by the Company.

(3) It is Respondent's further position that the proper construction of the provisions of the Act relating to the effect of the Union's conduct is that set forth in *NLRB v. Gilmore Industries, Inc.,* 341 F.2d 240 (6th Cir., 1965) *infra,* which decision should be followed by this Court.

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[3]Hereinafter called "Agreement".

[4]Hereinafter called the "Act".

B. Supplemental Factual Statement.

Respondent does not desire to controvert the statement of facts presented by the Board in its opening Brief. However, in view of the issues presented in this case, there are some factual omissions in the statement which should be called to the Court's attention.

(1) The Regional Director's Investigation of the Facts.

The Regional Director's Report on Objections and Certification of Representative[5] makes clear that his factual investigation with respect to the Company's objections was limited to ascertaining the content of the Union's promise concerning the reduction of initiation fees and the conditions attached to that promise. (R. 9, 10.) The Regional Director did not investigate whether, in fact, the Union's conduct impaired the employees' freedom of choice in the election. Rather, the Regional Director concluded that, based upon the Board's decision in *Weyerhaeuser Company,* 146 NLRB 1, *infra,* there was no impairment of the employees' freedom of choice as a result of the Union's conduct *as a matter of law,* and, hence, it was unnecessary for him to investigate whether, *as a matter of fact,* the Union's conduct impaired the employees' freedom of choice

(2) The Regional Director's Findings and Conclusions.

The Regional Director's Report contains *no finding of fact* with respect to whether the conduct of the Union in this case impaired the employees' freedom

[5]Hereinafter called the "Report".

of choice. The Regional Director apparently concluded that the Board's decision in *Weyerhaeuser Company, supra,* which purported to rule that union conduct of the sort there present did not, *as a matter of law,* impair the employees' freedom of choice, obviated the necessity of findings as to the effect of the challenged conduct upon the employees.

ARGUMENT

I. THE REGIONAL DIRECTOR'S FAILURE TO INVESTIGATE ALL OF THE RELEVANT FACTS WAS ARBITRARY AND CAPRICIOUS.

The Regional Director did not conduct an investigation as to the effect or impact of the Union's conduct upon the employees. The failure to conduct an investigation on the most significant and crucial aspect of the Company's objections violated the Agreement and was arbitrary and capricious. This fact alone is sufficient to preclude enforcement of the Board's Order.

The Agreement provides, in relevant part, as follows:

> "6. OBJECTIONS, CHALLENGES, REPORTS THEREON.— . . . The Regional Director *shall investigate* the matters contained in the objections and issue a report thereon. . . . The *method of investigation* of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be *final and binding.*" (R. 5.) (Emphasis supplied.)

The Regional Director patently failed to comply with the foregoing provision of the Agreement in that, notwithstanding the mandate of the Agreement that he *shall investigate* the matters contained in the objections, he actually investigate only the facts relevant to a *portion* of the objections and failed to investigate the facts relating to the actual thrust of the objections, i.e., the impact upon the employees.[6] The thrust of the Respondent's objections to the Union's conduct was the *effect* that the conduct had on the employees; yet the Regional Director's investigation stopped *prior* to reaching that question.

The Courts have considered the type and adequacy of investigation as being extremely significant when determinations pursuant to Agreements have been challenged. See *NLRB v. Carlton Wood Products Co.,* 201 F.2d 863, 867 (9th Cir., 1953) where the Court stated:

> "A decision to proceed by *ex parte* investigation rather than formal hearing might in a given case be arbitrary and capricious, but not where, as here, there is dispute only as to the conclusions to be drawn from undisputed basic facts."

Needless to say, this comment is especially relevant to this case because the crucial basic fact, i.e., the impact on the employees, is very much in dispute, and

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[6]As the emphasized language makes clear, the Regional Director is given authority to make a final decision as to the method of investigation of objections, but is not given authority to determine whether to conduct an investigation. In this case our argument goes not to the method of investigation, but to the fact that no investigation was conducted with respect to the most crucial fact involved in the case.

no factual determination has been made concerning the disputed fact. See, also, *NLRB v. Jas. H. Matthews & Co.,* etc., 342 F.2d 129, 130 (3d Cir., 1965), where the Court went out of its way to point out that:

> "There is no dispute as to the material facts. . . . The Respondent does not here question the adequacy of the investigation. . . . After the investigation had been concluded the Regional Director . . . prepared and served upon the parties a comprehensive report . . . "

In the instant case the Company's argument goes to the absence of an investigation as to the determinative facts in the case. Neither the Regional Director nor the Board made an investigation or determination regarding the impact of the Union's promise of benefit upon the employees. This failure can only be characterized as arbitrary and capricious.

II. THE ARBITRARY AND CAPRICIOUS STANDARD APPLIES ONLY TO QUESTIONS OF FACT OR PROCEDURE AND NOT TO LEGAL INTERPRETATIONS.

This Court has previously formulated the rule to be applied with respect to the effect of a consent-election agreement:

> "It is well settled that where a consent agreement is entered into providing that the determinations of the Regional Director on any question shall be final and binding, the procedural and substantive determinations thereafter made by the Regional Director can be successfully chal-

> lenged only on a showing that they are arbitrary or capricious or not in conformity with National Labor Relations Board policies or the provisions of the Act." *NLRB v. Hood Corp.,* 346 F.2d 1020, 1022 (9th Cir., 1965).

The Board appears to argue (Brief of Board, pp. 8-9) that the arbitrary or capricious standard is applicable equally to questions of fact, procedure, and law. If such were the rule, the language following the words "arbitrary or capricious" in the *Hood* case would be completely superfluous because the rule, as asserted by the Board, would be complete with the statement that determinations made by the Regional Director can be challenged only by showing that they are arbitrary or capricious. Courts seldom formulate a rule, such as that set forth in *Hood,* without giving meticulous care to the language used. If this Court in *Hood* had intended the arbitrary or capricious standard to be applicable to *all* determinations made pursuant to a consent-election agreement it simply would not have added the alternative standards dealing with "Board policies" or "the provisions of the Act". We submit that the rule as formulated makes clear that the arbitrary or capricious standard is only one of three appropriate standards. The other standards implicit in the *Hood* case apply to determinations not in conformity with Board policies or determinations not in conformity with the provisions of the Act. The language carefully chosen by the Court is completely inconsistent with the position here asserted by the Board.

There is sound reason behind the distinction carefully drawn by the Court in *Hood*. First, the arbitrary and capricious standard is singularly well suited to final resolution of disputed questions of fact and procedure. The Regional Director, or his representatives, are in a position to ascertain promptly and with first-hand knowledge the facts that are deemed relevant to the resolution of the factual issues that may be presented, and to select the appropriate procedures. When the parties have agreed that the Regional Director's determination as to such factual and procedural issues shall be final, the "arbitrary and capricious" standard is appropriate for Board or judicial review. However, the arbitrary and capricious standard is patently unsuited to the resolution of legal questions. A legal determination is either correct or not correct. There is simply no degree of "in between" where a Court may conclude that an inferior tribunal's interpretation of the law is erroneous but should nevertheless be affirmed because a reasonable man could think such was the law. The fact that reasonable men differ as to the proper construction of the law is attested by the number of dissents written in almost all controversial cases faced by the courts. Yet, while many statutes and judicial decisions have formulated the appellate policy that discretionary policy determinations or resolutions of factual or procedural issues by an inferior court or tribunal will be affirmed on appeal if supported by substantial *evidence,* we are unaware of any instance in which a higher court has been obliged to affirm a

legal interpretation of an inferior court or tribunal with which the superior court disagrees.

As we understand the Board's position, this Court is being told that it must affirm the Regional Director's legal interpretations even if the Court decides that the Regional Director made an erroneous legal determination. We do not read this Court's decision in the *Hood* case to require such a result and respectfully request that this Court make clear that no such effect flows from the execution of consent-election agreements.[7]

III. THE REGIONAL DIRECTOR'S CONCLUSIONS CHALLENGED IN THIS CASE ARE NOT FINAL UNDER THE TERMS OF THE CONSENT-ELECTION AGREEMENT AND THE BOARD'S RULES AND REGULATIONS.

The language in the Agreement providing that the determination of the Regional Director shall be final and binding upon any "question . . . relating in any manner to the election . . ." is in paragraph 1 of the Agreement, which is headed "Secret Ballot", and which provides that the election shall be held in accordance with the Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board. (R. 5.) In other words, it is questions as

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[7]If the Board's position is affirmed on this point, it is not unreasonable to suppose that practitioners will adopt a policy of refusing to allow their clients to execute such Agreements because in future cases a Regional Director could disregard the law as established by the Board if any Circuit had differed with the Board on the point at issue, or could disregard a prior decision of the Circuit having jurisdiction over the Regional Director, provided the Board or another Circuit agreed with the Regional Director's legal interpretation.

to whether the election procedures were in accordance with the Board's Rules, Regulations, and policies[8] that are "final" pursuant to the language here relied upon by the Board.

Paragraph 6 of the Agreement, which is headed "Objections, Challenges, Reports Thereon", makes a distinction between objections to the procedural conduct of the election, which is the only type of objections contemplated in paragraph 1 of the Agreement, and objections to "conduct affecting the results of the election".[9] At no place in the Agreement is it provided that the Regional Director's determination shall be final as to questions concerning *conduct affecting the results* of the election.

It may be argued by the Board that in calling attention to this omission in drafting, the Respondent is merely asserting a defense based on a legal technicality. If such an argument be made, we rejoin that the Agreement was drafted by the Board or its representatives and any ambiguity should properly be construed against the Board. But of greater significance, the limited scope of the provision granting finality to the Regional Director's determinations is consistent with the Board's Rules and Regulations authorizing consent-election agreements.

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[8]As we demonstrate in Argument, *infra,* the Board cannot adopt a "policy" which deprives employees of the protection afforded by the Act.

[9]That paragraph reads, in relevant part, as follows:

> "6. OBJECTIONS, CHALLENGES, REPORTS THEREON.—Objections to the conduct of the election *or* conduct *affecting the results* of the election, . . ." (R. 5) (emphasis supplied)

Section 102.62(a) of the Board's Rules and Regulations (29 CFR Part 102) provides in relevant part, that the parties may:

> ". . . enter into a consent-election agreement leading to a determination by the regional director of the *facts* ascertained after such consent election. . . . The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the *rulings* and *determinations* by the regional director *of the results thereof shall be final,* and the regional director shall issue to the parties a *certification* . . . with the same force and effect *as if issued by the Board, . . .*" (Emphasis supplied.)

It should require no argument that the Agreement must be construed together with the Rules and Regulations authorizing its execution in order to determine the proper construction, and the force and effect of the Agreement. Those Rules and Regulations specify that the *facts* shall be determined by the Regional Director.[10] The only matters which the Rules and Regulations expressly provide to be "final" are the rulings and determinations by the Regional Director of the *results* of the election, i.e., the tally of ballots. Finally, the Rules and Regulations provide that the *certification,* which is the only matter challenged in this case, shall have the same force and effect *as if issued by the Board.*

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[10]It seems clear that the Regional Director also violated this mandate. He did not determine, as a fact, the impact of the Union's conduct on the employees.

If the certification of the Regional Director is given the same force and effect as if issued by the Board, the legal interpretations and conclusions embodied in that certification are subject to review by this Court.[11] Accordingly, legal interpretations and conclusions are in no way affected by the fact that the certification was actually that of the Regional Director pursuant to the Agreement rather than a certification of the Board itself.

IV. AN EMPLOYER MAY NOT, BY AGREEMENT OR OTHERWISE, WAIVE RIGHTS GUARANTEED EMPLOYEES BY CONGRESS.

Section 7 of the Act guarantees employees the right to self-organization. In order to preserve and implement the free exercise of this right, the Board and the Courts have consistently held that coercive acts, threats, or economic inducements may interfere with or preclude the proper exercise of the rights guaranteed by Congress. Where conduct is found to have interfered with the free exercise of such employee rights, a new election will be directed in order that the employees can express their desire in a free and untainted atmosphere.[12]

Whether particular conduct constitutes an impairment of employee rights must be initially decided by the Board or, in proper cases, by the Regional Di-

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[11]Courts must set aside Board decisions which rest on an "erroneous legal foundation". *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113.

[12]The Board has used the phrase "laboratory conditions" to describe the atmosphere required for free elections. See, e.g., *Dal-Tex Optical Company Inc.*, 137 NLRB 1782, 1786-7.

rector. Where the Board has properly delegated certain matters to the Regional Director for decision, that decision is nevertheless encompassed within a Board order and that order is then subject to judicial review by a Court of Appeals. In reviewing decisions and orders of the Board, the Court of Appeals is empowered to enforce, modify or set aside the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. §10(e) of the Act. In *NLRB v. Brown,* 380 US 278, 291-92, the Court stated:

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such *review is always properly within the judicial province,* and courts would abdicate their responsibility if they did not fully review such administrative decisions." (Emphasis supplied.)

It seems clear that the Board's position in this case as to the limitations upon judicial review flowing from the execution of the Agreement is entirely inconsistent with the scope of judicial review established by Congress. Moreover, although it may be argued by the Board that an employer may, by private agreement, waive or modify its own statutory right to judicial review, it seems clear that an employer may not, by private agreement or otherwise, waive or modify the employees' statutory right to judicial review. Nor can the employees' right to judicial review be abro-

gated because it is the employer, rather than the employees, which pursues and seeks to have vindicated the employees' right to self-organization free of unlawful impairment. Cf. *International U. of E., R. & M. Wkrs., Local 613 v. N.L.R.B.*, 328 F.2d 723, 726; *Safeway Stores, Inc.*, 148 NLRB 660, 662.

V. THE AUTHORITIES RELIED UPON BY THE BOARD DO NOT SUPPORT ITS POSITION AS TO THE EFFECT OF A CONSENT-ELECTION AGREEMENT.

The Board seems to argue that two cases which are said to be "virtually identical" to the instant case support its position that the Agreement authorizes the Regional Director to make final and binding decisions "involving legal interpretations". (Brief, p. 8.) Respondent submits that the cases relied upon do not support the Board's position.

NLRB v. Jas. H. Matthews & Co., etc., 342 F.2d 129 (3d Cir., 1965), is clearly distinguishable from this case on several grounds. First, the Court there noted:

> "The Respondent does not here question the adequacy of the investigation." (342 F.2d 130.)

In the instant case, the adequacy of the investigation is at issue in view of the Regional Director's failure to investigate the most crucial issue presented by the Respondent's objections, i.e., the effect of promises of benefits upon the employees. Secondly, the Regional Director in the *Matthews* case did investigate and make specific factual findings as to the impact of the challenged conduct upon the employees. Specifically, the Regional Director there:

> ". . . found that a majority of the employees . . . had sufficient knowledge and information to enable them to evaluate the allegedly misleading statements." (342 F.2d 130.)

The Regional Director in *Matthews* also found that the company was afforded ample time to refute the allegedly false statements and concluded that under the facts and circumstances the results of the election were not adversely affected by the challenged conduct. The Court summarized the investigation and report of the Regional Director as follows:

> "It appears from the report of the Regional Director that the representation certification was based upon a thoughtful consideration of the evidence as a whole and a discriminating evaluation of the possible impact of the misleading statements on the fairness of the election." (342 F.2d 132.)

As the foregoing quote makes clear, the conduct of the Regional Director in *Matthews* is not even remotely similar, let alone virtually identical, to the conduct of the Regional Director in this case. It is the failure of the Regional Director to make "a discriminating evaluation", or any evaluation, of the possible impact of the Union's conduct on the employees that is the basis for the Company's position in this case. Where the Regional Director in *Matthews* investigated and made factual findings as to the possible impact on the employees of the challenged conduct, the Regional Director in this case made no such investigation and made no such factual findings. The Regional Director merely stated his legal inter-

pretation that the Board's *Weyerhaeuser* decision rendered such an investigation and factual findings unnecessary to the resolution of the Company's objections. (R. 10.)

The second case stated by the Board to be "virtually identical" to this case is *NLRB v. General Armature & Mfg. Co.*, 192 F.2d 316 (3d Cir., 1951). In that case the thrust of the employer's argument was that the Regional Director's representative had not made a "reasonable investigation of the alleged misconduct of the union" (192 F.2d 317), although it was undisputed that an investigation was conducted. The employer there sought to establish an arbitrary or capricious failure to conduct a reasonable investigation but, in the opinion of the Court, failed to do so. In the instant case the dispute is not as to the adequacy of the investigation of the Union's conduct. Rather, it is the Respondent's position that the Regional Director acted arbitrarily and capriciously in that *no investigation was conducted* as to the possible effect of the Union's conduct on the employees.[13]

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[13]Although the Respondent takes the position that this failure to conduct an investigation as to the possible effect of the Union's conduct constitutes a violation of the Agreement wherein it is provided that the Regional Director "shall investigate" the objections (R. 5), the failure to investigate on the part of the Regional Director is a corollary to his legal interpretation as to the effect of the Board's *Weyerhaeuser* decision. Accordingly, regardless of whether this case is viewed as a challenge to the Regional Director's failure to conduct *any* investigation as to the possible effect on the employees of the Union's conduct, or as a challenge to the authority of the Board to determine that, as a matter of law, the Union's conduct did not constitute an impairment of the employees' freedom of choice, neither of the cases relied upon by the Board is determinative of the question before this Court, and neither of these cases precludes the Court from reviewing the questions presented by the Company.

The Board appears to argue that the decision of the Fifth Circuit in *Manning, Maxwell & Moore, Inc. v. NLRB,* 324 F.2d 857 (5th Cir., 1963) supports the Board's position that the Agreement encompasses *legal* determinations of the Regional Director within the "arbitrary and capricious" standard. (Brief, p. 9.)

The opinion in *Manning, Maxwell & Moore* does not support the construction placed upon it by the Board. In that case a union won the election with 203 ballots being cast for the union and 177 ballots being cast against the union. The investigation conducted as a result of the company's objections determined that three anonymous, threatening telephone calls had been made and that one employee had been personally threatened by another employee to vote for the union. The Regional Director ruled that three isolated telephone calls and the one threat made to an employee did not create an atmosphere of fear or reprisal such as to render a free expression of choice impossible.

The Court approved the Regional Director's determination. In so doing, the Court made the following statement:

> "It was the duty of the Director to determine whether the conduct reasonably tended to interfere with the voters' free choice so that the uncoerced desires of the employees could not be expressed in the election. . . . Where there was no proof that the conduct was attributable to the union and where the number of voters threatened was insufficient to affect the outcome of the election, it can hardly be said that the Director acted

arbitrarily in upholding the election." (324 F.2d 858.)

As the above-quoted language makes clear, the *Manning, Maxwell & Moore* case is, in fact, supportive of the position of the Respondent in this case. The Respondent here urges that it was the duty of the Regional Director to determine whether the Union's conduct reasonably tended to interfere with the employees' free choice, and that the Regional Director acted arbitrarily when he failed to perform that duty.

VI. THE LEGAL QUESTION HERE PRESENTED ON THE MERITS WAS CORRECTLY RESOLVED BY THE COURT IN THE GILMORE INDUSTRIES CASE AND THAT CASE SHOULD BE FOLLOWED BY THIS COURT.

The relevant legal considerations which determine whether the Union's conduct was objectionable under the Act are well articulated by the Court of Appeals in *NLRB v. Gilmore Industries, Inc.*, 341 F.2d 240 (6th Cir., 1965). The Court there stated:

> ". . . the paramount purpose of the Act was to secure to the employees freedom of choice in the selection of their representatives. . . . *There can be no question but that freedom of choice may be seriously interfered with by economic inducements.*" (341 F. 2d 241.) (Emphasis supplied.)

The Court in *Gilmore* subsequently analyzed the decision in *NLRB v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679 (1st Cir., 1964) which is relied upon

by the Board. (Brief, p. 10.) The Court in *Gilmore* quoted the following language from the *Gorbea* opinion:

> " 'The question whether there is interference with the employees' freedom of choice is often subtle and difficult. However, we start with one simplifying principle, avoiding the necessity of making the often impossible determination of its actual impact in the particular instance, that an inducement normally is material if objectively it is likely to have an appreciable effect.' " (341 F.2d 241-242.)

Based upon the foregoing statements of legal principles, which are presumably not disputed by the Board in this case, the Court in *Gilmore* described the judicial function in relation to the question presented in the following language:

> "In determining whether there was an interference with the employees' freedom of choice, we cannot detach the waiver of initiation fees from the circumstances under which it was made. We must consider all of the relevant facts and circumstances of the case." (341 F.2d 242.)

As a result of its analysis in relation to the facts and circumstances of that case, the Court in *Gilmore* concluded:

> ". . . that the economic inducement offered by the union was material and impeded a reasoned choice." (341 F.2d 242.)

The Respondent does not contend that this Court should, or based on this record can, reach the same evidentiary conclusion as was reached by the Court

in *Gilmore.* The Respondent's position is simply that the Regional Director was required, in the language of the Court in *Gilmore,* to "consider all of the relevant facts and circumstances of the case" and then to make findings of fact or conclusions as to the possible effect on the employees of the economic inducement offered by the Union.

The Board apparently construes *Gilmore* as being contrary to certain cases cited by the Board where conduct similar to that engaged in by the Union in this case was also challenged. (Brief, pp. 10-11, footnote 10.) We do not believe that the holding or reasoning of *Gilmore* is inconsistent with those cases. *Macomb Pottery Company v. NLRB,* 376 F.2d 450 (7th Cir., 1967) and *Amalgamated Clothing Workers of America v. NLRB,* 345 F.2d 264 (2d Cir., 1965) found that the Board's orders were supported by substantial evidence on the record considered as a whole, while the Court in *Gilmore,* although phrasing its decision in different language, presumably found that the Board's order was not supported by such evidence.[14]

The Respondent submits that this case is controlled by *Gilmore,* rather than *Macomb Pottery* and *Amalgamated,* because there is *no* factual evidence in this record as to the crucial issue under the Act, namely, the impact upon the employees of the Union's conduct.

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[14]Cf. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488: "Congress has . . . made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, . . ."

When the reasoning of the Court in *Gilmore,* which we believe sets forth a proper statement of the law, is compared with the reasoning of the Regional Director in the instant case, it seems obvious that the Regional Director placed the cart before the horse. The Court in *Gilmore* held that the crucial determination—whether there was a possible interference with the employees' freedom of choice—was a legal determination based upon all of the relevant facts and circumstances in the case. Here the Regional Director did not attempt to ascertain the facts concerning the impact of such promises on the employees. The Regional Director apparently determined that the Board's decision in *Weyerhaeuser* dictated a conclusion that, as a matter of law, there was no impairment of the employees' freedom of choice, and that it was unnecessary for him to consider all of the relevant facts and circumstances of the case.[15] In the words of the Regional Director, the Union's:

> ". . . conduct [does not] impair the employees' freedom of choice (*Weyerhaeuser Company,* 146 NLRB 1). On the basis of the foregoing and the entire investigation, the undersigned concludes and finds that the employer's objections *do not raise substantial or material issues. . . .*" (R. 10.) (Emphasis supplied.)

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[15]The Board may assert that it is empowered to resolve the conflicting interests of union organization versus employee rights as a policy question. Any such argument implicitly admits that its decision is subject to judicial review. See *NLRB v. Brown, supra,* 380 U.S. at 391-2; *American Ship Building Co. v. Labor Board,* 380 U.S. 300, 318.

The Board seems to argue that the decision of the First Circuit in *Gorbea, supra,* supports its position in this case. (Brief, p. 10.) We submit that both the analysis and decision in *Gorbea* support the Respondent's position.

First of all, it should be noted that the language from *Gorbea* quoted in the Board's brief (pp. 10-11) is pure dictum. The Court's decision in *Gorbea* concluded that *under the facts there present* the purported waiver of initiation fees was a substantial organizational inducement and the Court refused to enforce the Board's order.

Of greater significance to this Court is the fact that the Court in *Gorbea* alluded to several material considerations which should properly have been considered by the Regional Director in reaching a conclusion as to the possible effect on the employees of the offer of waiver. For example, the Court noted that:

> ". . . since a penny saved is a penny earned we have difficulty in seeing why a $10 bribe to join the union is septic, . . . while a promise to waive a 'regular' $25 initiation fee is benign because there is a contingency." (328 F.2d 681.)

The Court also noted that:

> "We think the better expert on what persuasion is needed by persons sought to be induced is the knowledgeable party who offers [an] . . . inducement." (328 F.2d 682.)

In a footnote the Court in *Gorbea,* after noting that the initiation fee was $25 and that the employees' weekly earnings were $18 to $20, noted:

"To such individuals $25 would seem what may be called serious money." (328 F.2d 682, footnote 5.)[16]

In short, *Gorbea* is, read in its entirety, more consistent with the position of the Respondent than of the Board.

The Board's reliance on *Amalgamated Clothing Workers of America v. NLRB,* 345 F.2d 264 (2d Cir., 1965) is completely misplaced. The Second Circuit there adopted the same analytical process followed by the Sixth Circuit in the *Gilmore* case. The Court stated:

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[16]It seems self-evident that the Union thought the waiver or reduction of its initiation fee would have some advantage to the Union in the election or else it would not have thrown away money it might have otherwise collected. If the Union, the party closest to the employees, felt that the waiver would have an appreciable effect on the employees' choice, it seems inescapable that the Regional Director, the Board, and the Court must consider the possibility that the offer of waiver would have an effect on the employees. Whether the effect would be substantial or *de minimis* must, as the Court in *Gilmore* indicated, depend upon the facts of the particular case, including the amount of the fee, the employees' earnings, the educational level of the employees, and other factors. It seems clear, for example, that the Regional Director or Board could properly conclude that the waiver of a $5.00 initiation fee would have a *de minimus* effect on highly educated employees earning $200 a week. Conversely, it seems clear that waiver of an initiation fee of $500 could have a substantial effect on employees earning $50 a week. The Board apparently takes the position that both cases *must* be treated the same. We submit that a court called upon to enforce the Board's order in the hypothetical case discussed above involving a $5 initiation fee could very well find substantial support in the record and enforce the Board's order, while a court in the case involving the $500 initiation fee could very well find that the Board's order lacks substantial support in the record and refuse to enforce the order. The important and necessary ingredient is an investigation on which to base findings of fact, which in this case the Regional Director failed to accomplish.

> "The question remains whether the inducement [offer of waiver] was proper or improper. (citing *Gorbea.*) We must consider, among other things, what justification there may have been for the waiver and the extent to which it foreclosed a rational decision on the part of the employees. (again citing *Gorbea.*)" (345 F.2d 268.)

If it was necessary for the Court to consider whether the waiver foreclosed a rational decision by the employees, it seems inescapable that it was also necessary for the Regional Director in this case to consider that question. His failure to do so results in the absence from this record of a finding by the Regional Director on the single most significant issue presented to him.

VII. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE BOARD'S ORDER.

The Regional Director's Report, which provides the foundation for the Board's order, makes clear that the investigation ascertained the statements made by the Union representatives to the employees, but did not attempt to ascertain or evaluate the impact on the employees of those statements. Rather, the Regional Director stated that the Union's conduct did not impair the employees' freedom of choice, citing the Board's decision in *Weyerhaeuser Company,* 146 NLRB 1. He then stated (R. 10):

> "On the basis of the foregoing and the entire investigation, the undersigned concludes and finds

> that the employer's objections *do not raise substantial or material issues* with respect to the election and they are hereby overruled." (R. 5.) (Emphasis supplied.)

It seems clear that the Regional Director's view of the law led him to conclude that it was unnecessary for him *to consider the factual issues and to make factual findings* as to the possible effect on the employees of the Union's conduct.

There is no evidence in the record to fill this gap caused by the Regional Director. Accordingly, the Board's order should not be enforced.[17]

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[17]This is not the first time the Board has attempted to by-pass its normal functions of investigation and fact-finding through the adoption of *per se* rules, policies or conclusions. See cases cited in *NLRB v. Brown, supra,* 380 U.S. at 291, footnote 5.

CONCLUSION

It is respectfully submitted that upon the record in this case the Court should conclude:

(1) That Respondent did not engage in an unlawful refusal to bargain in violation of Sections 8(a)(5) and 8(a)(1) of the Act;

(2) That Respondent has committed no unfair labor practices whatsoever; and

(3) That the Decision and Order of the National Labor Relations Board in this matter should be denied enforcement in its entirety.

Dated, San Francisco, California,
February 27, 1968.

Respectfully submitted,
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By WESLEY J. FASTIFF,
JAMES A. CARTER,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

WESLEY J. FASTIFF